

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP2268-CR

Cir. Ct. No. 2016CF213

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRISTOPHER ARNOLD LEITZINGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County:
CRAIG R. DAY, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Kristopher Leitzinger appeals a judgment of conviction. The dispositive issue is whether his suppression motion should have been granted because police lacked a legal basis to continue the investigatory stop after seeing that the person they wanted to speak to was not in the vehicle. We conclude that the motion should have been granted, and we reverse.

¶2 Leitzinger was charged with controlled substance offenses and moved to suppress evidence. The circuit court denied that motion, and Leitzinger then pled no contest to some of those charges. This appeal is taken as a matter of right under WIS. STAT. § 971.31(10) (2015-16).¹

¶3 Most of the necessary facts can be stated briefly. A police officer pulled over the car Leitzinger was driving. The State argues that there was a proper legal basis for that investigatory stop. The State argues that police had probable cause or reasonable suspicion to arrest or speak with a person we will call V., who was a suspect in burglaries. The State argues that police had seen V. riding in Leitzinger's car earlier in the day and, at the time the officer pulled Leitzinger over, the officer could not see whether V. was in the car.

¶4 Leitzinger argues that police lacked a basis to make this investigatory stop. However, for purposes of this opinion, we assume, without deciding, that the information about V. provided police with a sufficient basis to make an investigatory stop of the vehicle Leitzinger was driving.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶5 Thus, we assume the police had probable cause or reasonable suspicion to stop Leitzinger's vehicle because of a reasonable belief that V., a suspect in burglaries, was in that vehicle. This is the only legal basis for making the stop that the State argues. The State does not argue that there was any legal basis related to Leitzinger personally.

¶6 Once the stop was made, the officer could see as he made contact with the driver that V. was not in the vehicle. However, the officer continued to maintain contact with Leitzinger and his passenger to ask questions. We will describe some of the details of that contact further below. However, eventually this contact led to the discovery of evidence in the car.

¶7 Leitzinger argues that, once police determined that V. was not in the vehicle, the legal basis for the investigatory stop was gone and the continued seizure of the occupants for questioning about V. and other matters was unlawful. The parties agree that these arguments present questions of law that we decide without deference to the circuit court. In response, the State makes several arguments, but none of them persuade us that the questioning of the occupants was permitted.

¶8 The State argues that reasonable suspicion existed to extend the stop because of Leitzinger's evasive answers to the officer's questions. This argument is based on an assumption that the officer was permitted to ask the questions that elicited the evasive answers. However, if Leitzinger's evasive answers occurred *after* a time that the stop should already have been terminated, those answers cannot provide a legal basis to continue the stop.

¶9 The State attempts to address this potential problem by asserting that Leitzinger was evasive "from the moment that [the officer] first initiated contact

with him.” However, the State does not describe specifically what evasion it believes occurred *at the first moment of contact*.

¶10 The video of the event shows that, starting from the commencement of interaction with the vehicle occupants, the officer: (1) identified himself; (2) informed Leitzinger, incorrectly, that he had been pulled over for a possible seat belt violation, which the officer then acknowledged he could now see was not actually present; (3) asked Leitzinger and the passenger for their driver’s licenses; (4) asked where they were from, to which he was told Shullsburg; and (5) asked what brought them to Lancaster, to which he was told that they were visiting family.

¶11 The State does not describe, and we do not see in the video, any objective basis to conclude that Leitzinger or his passenger was evasive in responding to these initial questions. The State does not identify any specific signs of evasion by Leitzinger until after this point.

¶12 Accordingly, at the time Leitzinger first became evasive, the seizure had already gone several questions beyond the point at which the original legal basis to make the stop no longer existed, because the officer had seen that V. was not in the car. Therefore, we conclude that no reasonable suspicion existed when the officer asked the questions described above. This means that evasive answers Leitzinger gave to *later* questions cannot provide a basis for extending the stop.

¶13 The State also makes several other arguments to explain why, even if reasonable suspicion did not exist, the continued seizure of Leitzinger was lawful. Although the State does not express the proposition as baldly as this, all of these arguments appear to presume that an investigatory seizure may be continued, even without reasonable suspicion, for the sole purpose of questioning a person

who may have knowledge about the location or activities of a third person who police want to arrest or question. In other words, the State seems to be arguing that investigative seizures may be used to question not only those who are suspected of crime, but also all people who might have information about crime or criminals. Apart from the case we discuss next, the State does not, and we believe cannot, cite any law for that broad proposition.

¶14 The State relies on *Illinois v. Lidster*, 540 U.S. 419 (2004). In *Lidster*, the Court held that it was permissible for police to use a roadblock checkpoint to ask drivers about an incident that had occurred in that location a week earlier. *Id.* at 421-22. The State appears to be relying on the fact that the Court held that such a seizure was lawful for the purpose of investigating a crime, even though the seizure was made without reasonable suspicion that the stopped drivers were involved in criminal activity. However, the State has not explained how or why the reasoning in *Lidster* should apply beyond the checkpoint context. As even a cursory review of checkpoint cases reveals, they present unique considerations that stand apart from seizures of a single person, as in the case before us.

¶15 Beyond *Lidster*, the State argues that it was reasonable and good police work for the officer to continue questioning Leitzinger after the officer saw that V. was not in the vehicle. However, the State does not cite any law for the proposition that continuation of a seizure without reasonable suspicion is lawful simply because it is an effective, and therefore “reasonable,” police strategy. Nor does the State cite any law for the proposition that “good police work” is a basis for continuing a seizure.

¶16 Furthermore, the State does not come to grips with the fact that a ruling against it on this issue does not mean that the officer was prohibited from doing the acts that the State considers good police work. Instead, it means only that the officer could not do those acts *while still holding Leitzinger pursuant to a compulsory seizure*. As Leitzinger points out, the officer could have told Leitzinger that he was free to leave but that the officer would nevertheless like to ask some questions.

¶17 Neither party's briefing refers to the opinion in *State v. Smith*, 2018 WI 2, 379 Wis. 2d 86, 905 N.W.2d 353, *petition for cert. filed* (U.S. Apr. 3, 2018) (No. 17-8778). In *Smith*, the court held that police may continue a traffic stop, even after reasonable suspicion has dissipated, for the purpose of conducting the ordinary inquiries of a traffic stop, such as asking for license and insurance information. *Id.*, ¶¶11-32. As we understand *Smith*, that holding would not affect our analysis in this case because *Smith* is focused on the extension of traffic stops, not investigatory stops. And, furthermore, even if *Smith* were to apply to all stops, here the officer went beyond those ordinary inquiries and began to question Leitzinger and his passenger on other matters.

¶18 To summarize, the State's additional arguments for continuing the stop without reasonable suspicion avoid the real issue, which is not whether it was a good idea for the officer to ask Leitzinger further questions, but whether the officer could lawfully do so as part of an investigatory seizure. The State's arguments do not persuade us that the seizure of Leitzinger could be continued without reasonable suspicion. And, above, we rejected the State's one argument that reasonable suspicion existed. Therefore, we conclude that the seizure of Leitzinger became unlawful once the officer knew that V. was not in the car. Leitzinger's suppression motion should have been granted on that basis.

¶19 Accordingly, we reverse the judgment of conviction and remand with directions to allow Leitzinger to withdraw his pleas, and to grant his suppression motion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

